No. 20,465

FEB 14 1967

IN THE

United States Court of Appeals

For the Ninth Circuit

Barbara L. Hiatt,
Appellant,
vs.
San Francisco National Bank, Doe One, Doe Two, and Federal Deposit Insurance Corporation as Receiver of San Francisco National Bank,
Appellees.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLANT

Edmond C. Ward,
Pendergrass, McKenney, Perry & Ward,
1299 Fourth Street,
San Rafael, California 94901,
Attorneys for Appellant.

BERNAU-WALSH PRINTING CO., SAN FRANCISCO

Table of Citations

Cases

Constitutions, Statutes, and Regulations

No. 20,465

IN THE

United States Court of Appeals
For the Ninth Circuit

BARBARA L. HIATT, *Appellant,* vs. SAN FRANCISCO NATIONAL BANK, DOE ONE, DOE TWO, and FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of SAN FRANCISCO NATIONAL BANK, *Appellees.*	

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was commenced in the Superior Court of the State of California, in and for the City and County of San Francisco, against San Francisco National Bank, a national banking association, and Federal Deposit Insurance Corporation, its duly appointed Receiver, to recover interest charged and taken by the defendant bank on a loan made to plain-

tiff at the alleged rate of 25.7 percent upon the ground that said interest is usurious within the meaning of Title 12, U.S.C. Sections 85 and 86. (R. 8-14.)

The action was removed to the United States District Court for the Northern District of California, Southern Division, upon petition of defendant, Federal Deposit Insurance Corporation, under the provisions of Title 28, U.S.C. Section 1441 upon the ground that the action is one of which the United States District Court had original jurisdiction under Title 28, U.S.C. Sections 1346, 1348, and Title 12 U.S.C. Section 1819. (R. 1-7.)

The defendant's motion to dismiss (R. 15-18), made under Rule 12, F.R.C.P., upon the ground that the alleged rate of interest is not rendered usurious by Section 85 of Title 12 U.S.C. was granted by the United States District Court and plaintiff's complaint was dismissed. (R. 24-31.)

From the "Order Granting Defendant's Motion to Dismiss" the plaintiff appeals under the provisions of 28 U.S.C. 1291. (R. 32; R. 40-41.)

STATEMENT OF THE CASE

1. The Federal Usury Law. Title 12, U.S.C., 85 provides in part:

> "Any association may . . . charge . . . interest at the rate allowed by the laws of the state . . . where the bank is located . . . and no more, except that where by the laws of any state a different rate is limited for banks organized under state laws, the

> rate so limited shall be allowed for associations organized or existing in any such state under this chapter. When no rate is fixed by the laws of the state, . . . , the bank may take, receive, reserve, or charge a rate not exceeding 7 percent . . ."

2. The California Usury Law. Prior to the enactment of the usury law in 1918 the California statutes provided that:

> "Parties may agree in writing for the payment of any rate of interest . . ." (Statutes 1850, C. 31, Section 2; Civil Code, 1872, Section 1918).

By initiative measure approved November 5, 1918 (General Laws Act 3757) the maximum rate of interest was fixed at 12 percent per annum. Thereafter, Section 22 of Article XX of the California Constitution, adopted November 6, 1934, fixed the legal rate of interest at 7 percent per annum and permitted written contracts for a rate of interest not exceeding 10 percent per annum. However, "any bank created and operating under and pursuant to any laws of this state or of the United States of America . . ." was exempted from the provisions of the section, the legislature being given the specific authority to prescribe the maximum rate for the exempted classes.

The effect of the California law is that citizens generally may charge interest not exceeding 10 percent per annum. State and national banks are among the exempt classes and the legislature has been given the specific authority by the California Constitution to prescribe the maximum rate for the exempted classes.

The effect of these provisions is summarized in the California case of *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 582 (1949):

> "The foregoing history is a demonstration that it was the purpose of the constitutional amendment of 1934 to free the legislature from the restraints imposed by inflexible usury provisions so that interest and charges more appropriate to business conditions peculiar to each of the exempted classes could be established. Those who voted for the 1934 amendment had reason to expect that the exempt classes would not remain unregulated indefinitely; but until the legislature exercised the power granted to it by the amendment to regulate the business of lenders in a manner appropriate to each exempted class, the class not so governed by the legislature is subject to no restriction on interest rates or charges."

QUESTION PRESENTED

May a bank created and operating under and pursuant to the laws of the United States of America charge any rate of interest in California or is it limited by the provisions of 12 U.S.C. 85?

SUMMARY OF ARGUMENT

Plaintiff contends that a bank created and operating under and pursuant to the laws of the United States of America, specifically, in this case, San Francisco National Bank, is limited to an interest rate of 10 percent per annum.

The leading case of *Tiffany v. Bank of Missouri*, 18 Wall. 409, 21 L.Ed. 862 (1874), discusses three rates of interest available to national banks:

1. If no rate of interest is defined by state law, the bank may charge 7 percent (or current discount rate plus 1 percent, whichever is greater).

2. If a rate of interest is fixed or allowed under state law for lenders generally (in California 10 percent), the bank may charge that rate but no more.

3. If a higher rate of interest is limited by state law for state banks, this same privilege is accorded to national banks. (No higher rate is limited for state banks in California.)

Appellant concedes that if the law of a state specifies a given rate of interest for state banks (for example 15%) national banks operating in that state could also charge 15%.

Appellant further concedes that if state law provides that state banks may charge one rate of interest (say 8%) and citizens of the state generally a higher rate of interest (say 10%), national banks may charge the highest rate permitted in the state, in this case 10%. (*Tiffany v. Bank of Missouri*, supra.)

Appellant further concedes that if state law provides that "parties may agree in writing for the payment of any rate of interest" that both state and national banks may charge any rate of interest (*Daggs v. Phoenix National Bank*, 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882) (1900.)

Appellant contends, however, that where the State of California fixes a rate of 10 percent per annum for its citizens generally and exempts state and national banks from the provisions of the section setting 10 percent as the limit for citizens generally, that although in such a case state banks are unlimited in the rate of interest they may charge, national banks are governed by the provisions of 12 U.S.C. 85 which specifically provide:

> "Any association may . . . charge . . . interest at the rate allowed by the laws of the state (in California 10%) . . . except that where by the laws of any state a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this chapter." (In California no different rate is limited for banks organized under state laws, they are merely exempted from the 10% limitation.)

ARGUMENT

Appellant's research indicates that the leading case on the subject is *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882 (1900). Appellant's research does not indicate that any case has gone beyond the holding in *Daggs* where the law of the Territory of Arizona in question read "parties may agree in writing for the payment of any rate of interest . . ." This was similar to the California law prior to 1918. Under the facts in the *Daggs* case the Supreme Court held that since state banks could agree

in writing for the payment of any rate of interest, national banks could do likewise.

The case at bar can readily be distinguished from the facts in the *Daggs* case however, since, in the *Daggs* case, there was a specific statute which stated "parties may agree in writing for the payment of any rate of interest". In the present case there is no such statute. There is rather a constitutional provision setting the maximum rate of interest in California at 10 percent but exempting state and national banks from the said provision.

No one can dispute that "when no rate is fixed by the laws of the state" a "bank may take, receive, reserve, or charge a rate not exceeding 7 percentum . . ." since such is the clear language of 12 U.S.C. 85.

Nor can anyone dispute that national banks can charge interest at the rate of 10 percent in California rather than the 7 percent limit set forth in 12 U.S.C. 85, since 12 U.S.C. 85 further provides "any association may take, receive, reserve, and charge . . . interest at the rate allowed by the laws of the state".

Can it be argued, however, that in California "a different rate is limited for banks organized under state laws"?

California law sets no specific rate of interest for state banks. Neither does California law say that parties may agree in writing for the payment of any rate of interest as in the *Daggs* case.

Since California law has neither fixed a rate of interest for banks nor provided that parties may agree

in writing for the payment of any rate of interest, it is submitted that the clear language of 12 U.S.C. 85 must govern the rate of interest to be charged by national banks and national banks may therefore charge interest "at the rate allowed by the laws of the state", in California 10 percent and no more. To hold otherwise would be to nullify the clear language of 12 U.S.C. 85.

What difference is there so far as banks are concerned between California and a state where there is absolutely no law on the question of interest rates? In such a state both individuals and state banks could charge any rate of interest whatsoever, but national banks under the clear language of 12 U.S.C. 85 would be limited to 7 percent interest.

In California, state law has acted on some categories of lenders but not on all categories. State law has fixed the rate for lenders generally at 10 percent but has exempted state and national banks. The result is therefore that citizens generally may lend at the rate of 10 percent and state banks may charge any rate of interest whatsoever. Appellant contends, however, that national banks may not therefore charge an unlimited rate of interest but rather must look to 12 U.S.C. 85 which limits national banks to "the rate allowed by the laws of the state". In California this rate is 10 percent since no "different rate is limited for banks organized under state laws".

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court erred in concluding that national banking associations may charge any rate of interest in the State of California and therefore erred in granting judgment to the appellee and in dismissing appellant's complaint.

Dated, San Rafael, California,
December 7, 1965.

Edmond C. Ward,
Pendergrass, McKenney, Perry & Ward,
Attorneys for Appellant.

Certificate of Counsel

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edmond C. Ward,
Attorney for Appellant.